

In the Matter of Matthew Green,
Department of Human Services
DOP Docket No. 2006-286
(Merit System Board, decided June 7, 2006)

The appeal of Matthew Green, a Cottage Training Technician at Vineland Developmental Center, Department of Human Services, of his removal, effective May 12, 2003, on charges, was heard by Administrative Law Judge (ALJ) Joseph F. Martone, who rendered his initial decision on May 2, 2006. Exceptions were filed on behalf of the appellant, and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on June 7, 2006, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision but did not adopt the ALJ's recommendation that the removal be upheld. Rather, the Board modified the removal to a six-month suspension.

DISCUSSION

The appellant was indefinitely suspended, effective May 12, 2003, pending the outcome of criminal charges. The appellant was charged with violations of *N.J.S.A. 2C:13-2(a)* (a third degree crime), *N.J.S.A. 2C:12-1(b)4* (a fourth degree crime), and *N.J.S.A. 2C:12-3(b)* (a third degree crime). Additionally, the Preliminary Notice of Disciplinary Action charged the appellant with conduct unbecoming a public employee and recommended his removal based on the conduct underlying the criminal charges.¹ On June 21, 2004, the appellant pled guilty to one count of weapons possession in violation of *N.J.S.A. 2C:39-3(e)*, a fourth degree crime, and the remaining criminal charges were dismissed. Based on his conviction, the appointing authority removed him from employment on the administrative charge of conduct unbecoming a public employee. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

At the hearing, the appellant testified that the criminal charges arose from an unfortunate domestic incident. Specifically, he had recently purchased a pellet gun, which he intended to resell online. While the pellet gun was still in his

¹ It is noted that, pursuant to *N.J.A.C. 4A:2-2.7(a)1*, a Final Notice of Disciplinary Action should have been issued with regard to the indefinite suspension. The appointing authority then should have issued a new Preliminary Notice of Disciplinary Action upon disposition of the criminal charges, setting forth any remaining administrative disciplinary charges. See *N.J.A.C. 4A:2-2.7(b)1*.

possession, he and his wife were involved in a verbal dispute, which resulted in his wife summoning the police to their home. The appellant stated that his wife told the police that he had pointed the pellet gun at her during their altercation, and the appellant was arrested as a result. The appellant stressed that he has never threatened anyone with the pellet gun, and he underscored that his wife subsequently recanted her allegation that he had pointed it at her. Nevertheless, the appellant's criminal case was prosecuted, and he pled guilty to a fourth degree crime.

In his initial decision, the ALJ noted that the appellant's conviction of possession of a weapon was binding, and the appellant was thereby precluded from relitigating his guilt or innocence of that charge in an administrative proceeding. Thus, the ALJ found that he committed the underlying offense, which constituted conduct unbecoming a public employee. With regard to the penalty, the ALJ emphasized the appellant's position of trust with a vulnerable, at-risk population. The ALJ also found that the appellant's conviction, in and of itself, was egregious enough to warrant his removal, regardless of his prior disciplinary history.

In his exceptions, the appellant argues that the Board should consider several mitigating factors in its determination of the charges and the proper penalty. He contends that his criminal conviction had absolutely no relationship to his employment; he was charged with offenses that occurred solely within the privacy of his own home. Moreover, he emphasizes that he has been employed for over 20 years, and he has never been subjected to any disciplinary action. In response, the appointing authority asserts that the appellant's attempt to minimize his conduct because it occurred in his home and was directed at his wife is "startling." The appointing authority maintains that it met its burden of proof, and it urges the Board to uphold the charges and the removal.

In the instant matter, the ALJ correctly determined that the appellant's conviction for possession of a weapon was binding and established that the appellant was guilty of the charged conduct. The Board is not persuaded by the appellant's contention that his behavior did not amount to conduct unbecoming a public employee because it did not occur at work. It is well settled that public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public's trust in the integrity of its employees is intolerable. *See, e.g., Karins v. City of Atlantic City*, 152 N.J. 532 (1998). This is especially true where, as here, the employee at issue serves in a direct care position for a vulnerable population. The employer and the public must be assured that employees in such positions are worthy of the utmost confidence and trust. Therefore, the Board agrees with the ALJ's determination that the appellant's criminal conviction constituted conduct unbecoming a public employee.

However, with regard to the penalty, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board also utilizes, where appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Concerning the seriousness of the incident, while the Board does not wish to minimize the serious nature of the appellant's conduct, it cannot be ignored that the weapon which he was convicted of possessing was a pellet gun. It must also be recognized that there was not a direct nexus between his criminal behavior and his employment. Further, it must be underscored that the appellant had been employed for over 20 years and had no prior disciplinary record. Thus, while recognizing the relatively serious nature of the infraction as well as the mitigating factors discussed above, the Board finds that removal was not consistent with the concept of progressive discipline. Nevertheless, in view of the fact that the charges against the appellant were proven, major disciplinary action is warranted. Therefore, the Board concludes that it is appropriate to impose the maximum suspension permitted by *N.J.S.A.* 11A:2-20, a six-month suspension. This severe penalty should serve as a warning to the appellant that any future infractions may result in removal.

The Board notes that the appellant was properly indefinitely suspended from employment, commencing on May 12, 2003, pending the disposition of the criminal charges against him. He entered a guilty plea, thereby disposing of the charges on June 21, 2004. *N.J.A.C.* 4A:2-2.10(c) provides that, where an employee is indefinitely suspended, he or she shall receive back pay, benefits and seniority if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated. In the instant matter, the appellant's guilty plea precludes him from receipt of back pay, benefits and seniority for the time period in which he was indefinitely suspended. Thus, the appellant's employment record should reflect that he was serving an indefinite suspension from May 12, 2003 through June 21, 2004. Additionally, in light of the above, the appellant's record should also reflect that he was suspended from employment without pay from June 22, 2004 through December 22, 2004.

Since the penalty has been modified from a removal to a six-month suspension, the appellant is entitled to mitigated back pay, benefits and seniority for the period following the suspension (December 22, 2004) to the date of actual reinstatement pursuant to *N.J.A.C.* 4A:2-2.10.

N.J.A.C. 4A:2-2.12(a) provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div., March 18, 2004); *Johnny Walcott v. City of Plainfield*, 282 *N.J.*

Super. 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Board, the charges were sustained. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Merit System Board finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Board modifies the removal to a six-month suspension. The Board further orders that the appellant be granted back pay, benefits and seniority for the period from December 22, 2004 to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Board, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.